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Supreme Court of the United States

October Term, 1942.

GULF REFINING COMPANY,
Appellant Below

Petitioner,

vs.

LOUIS FETSCHAN and CROSS PARK REALTY COMPANY,
Appellees Below

Respondents.

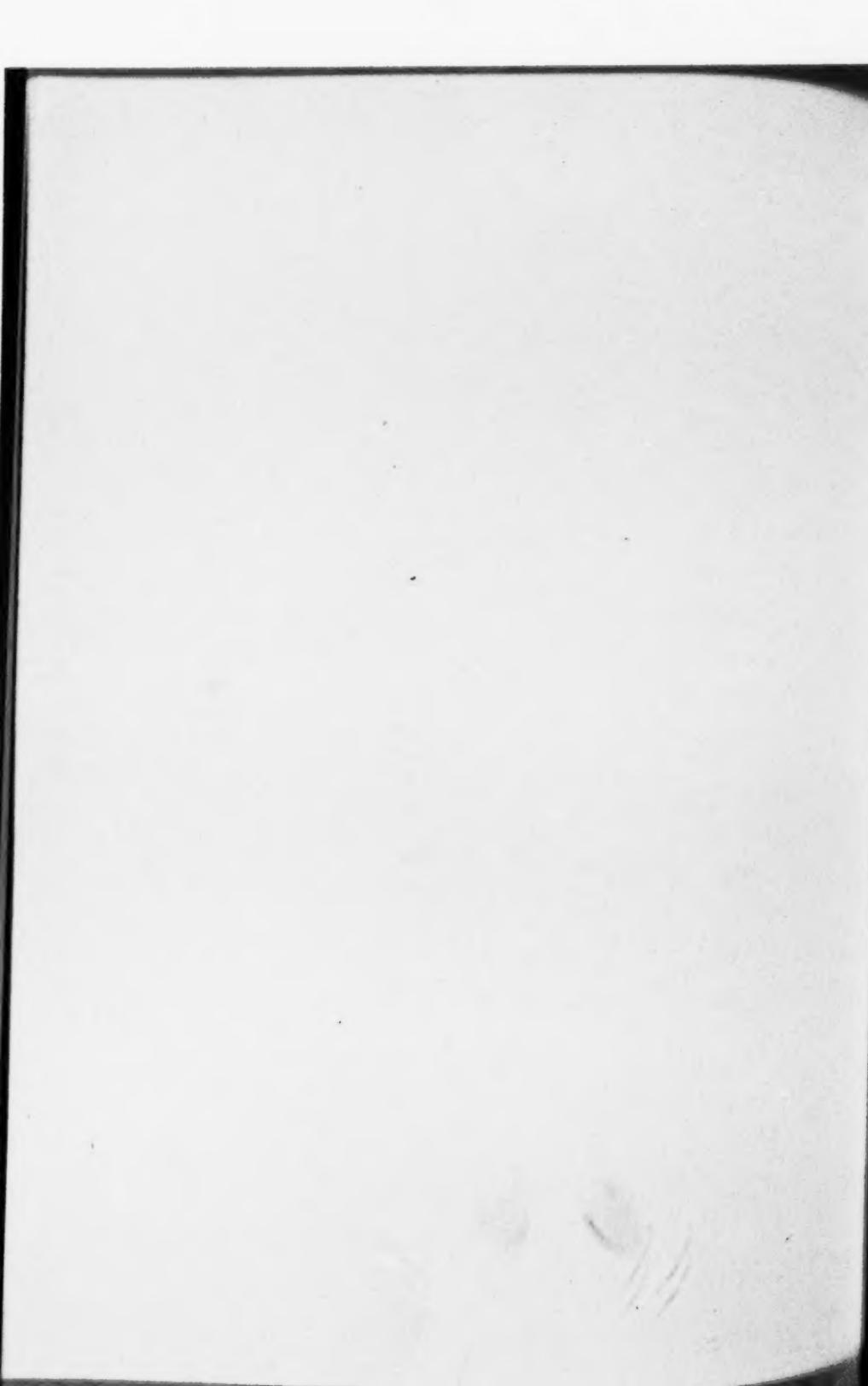
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUP- PORT THEREOF.

To the Honorable Chief Justice
and Associate Justices of the
Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit entered on June 2, 1942 affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, entered on November 22, 1940.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals filed on June 2, 1942 affirming the judgment of the District Court and the

opinion of the Circuit Court of Appeals filed on August 28, 1942 denying the petitioner's application for rehearing are not yet reported, and are printed as an appendix to this petition and brief.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the judicial code as amended by the Act of February 13, 1925, 43 Stat. 938.

The opinion of the Circuit Court of Appeals on rehearing was filed August 28, 1942, and before the expiration of the three months period thereafter an extension of time for filing this petition was granted and the time extended until January 27, 1943.

SUMMARY STATEMENT.

The plaintiff's action is based upon a claimed violation by Gulf Refining Company, the petitioner, of a lease in which the plaintiff is the lessee and the petitioner the lessor. The lease covers a parcel of several acres of land located in the toe of a horseshoe bend on the Great Miami River, a few miles north of where it empties into the Ohio River, a short distance from Cincinnati, Ohio. The property covered by the lease was formerly owned by Paul and Alice Roessler, who, as lessors, executed a twenty year lease to Louis Fetschan in October, 1925. The complete lease is found in the printed Record, Volume 3, Page 1 et seq. Subsequently, Gulf Refining Company purchased all of the property in the horseshoe bend, including the acreage under lease to Fetschan, which was purchased subject to Fetschan's lease.

Along the river frontage at the toe of the horseshoe Fetschan built a summer camp of twenty-two cottages.

III.

Across the heel of the horseshoe Gulf Refining Company erected an oil refinery and a number of storage tanks. Fetschan's action claims that fumes and odors emitted from the operation of the refinery caused him to lose the rentals from his summer cottages.

In January, 1937, the great flood of the Ohio and Great Miami River occurred and fifteen of Fetschan's cottages were washed away, and in his action he claims that the volume of the flood waters which overflowed his leasehold property was increased by reason of the fact that Gulf Refining Company had built levees around its tanks and that because the elevation of the land had been increased by these levees, that a greater volume and current was thrown over the land in the toe of the horseshoe where Fetschan's cottages were located.

The lease under which Fetschan held the land in the toe of the horseshoe bend, and which lease was assumed by Gulf Refining Company when it purchased the property, provided that the lessee

"Shall lawfully, peaceably and quietly hold, occupy and enjoy said premises during said term, without any let, hinderance, ejection or molestation by said lessors, or their heirs, or any person or persons lawfully claiming under them." (Printed Record Volume 3, Page 4)

In Fetschan's action he claimed that Gulf Refining Company violated this provision of the lease in two respects: first, that the operation of the refinery caused him damages in the loss of rentals from his cottages from January, 1934, to August, 1938; and, second, that by the building of the levees around the tanks Gulf Refining Company caused him to lose fifteen of his cottages in the flood of January, 1937. For the fumes damage he asked \$8000.00; for the flood damage for the loss of his cottages he asked for \$12,400.00.

Upon the trial the jury returned a general verdict in Fetschan's favor for \$7,908.00. (Record, Volume 1, Page 35).

Cross Park Realty Company was made a party because in 1931 Fetschan had assigned his lease as collateral security guaranteeing the performance on Fetschan's part of a contract between him and Cross Park Realty Company, but neither that contract nor the assignment of the lease have any bearing upon the matters involved in this petition.

When the case was being submitted to the jury, the defendant Gulf Refining Company, petitioner herein, sought to have the jury determine specific questions of fact by means of special interrogatories, first, as to whether or not there had been any breach of the lease by Gulf Refining Company on account of the fumes or on account of the flood, and, second, if the jury found there had been a breach of the lease, then to have the jury find, (a) how much damage there was from the fumes, that is, how much Fetschan had lost from rentals of his cottages, and (b) how much damage Fetschan had suffered from the loss of the cottages by the flood.

These interrogatories will be found as Exhibit G, Page 35, and Exhibits K and L, Page 36 of the Record, Volume 1.

The jury answered interrogatory G, which was as follows:

"Did the defendant, The Gulf Refining Company, as landlord, give to the plaintiff, quiet and peaceful enjoyment of his premises from January, 1934 to August, 1938, without hindrance or molestation as those terms have been defined to you?

Answer: No.

Maurice Robison, Foreman."

The jury did not answer interrogatory K, which was as follows:

"In the event that you find that plaintiff has been damaged by the emission of smoke, or odors, or gases, or smudge, or noises from the refinery of defendant, the Gulf Refining Company, and that the Gulf Refining Company is liable in damages to plaintiff therefor, state the amount of such damage.

Answer:"

The jury did not answer interrogatory L, which was as follows:

"In the event you find that defendant, the Gulf Refining Company, is liable to plaintiff for the value of those of his cottages which were destroyed by the 1937 flood, state the reasonable value of those cottages immediately prior to that flood.

Answer"

(Under the law of Ohio the determination of the amount of damage is by fixing the reasonable value of the property immediately prior to the occasion which caused the loss.)

There were only two elements of damage in Fetschan's action: One for the loss of rentals because of the fumes etc. from the refinery, which we will refer to for brevity as the "fumes damage" and, second, the loss of the fifteen cottages, which we will refer to as the "flood damage."

The jury could not agree upon the amount of the fumes damage.

The jury could not agree upon the amount of the flood damage.

The trial court received the general verdict and entered a judgment thereon against Gulf Refining Company, and your petitioner claims that the receiving of the general verdict and entering judgment thereon was not only erroneous, but constituted a denial of the right of trial by jury as pro-

vided by the Seventh Amendment of the Constitution of the United States.

Upon appeal the Circuit Court of Appeals affirmed the judgment and erroneously, as we claim, sanctioned the procedure of the trial court upon the incorrect assumption that the general verdict covered only the element of fumes damage and did not contain any award to Fetschan for the flood damage. The Record shows, as our brief will fully detail, that both elements of damage were submitted to the jury and that the general verdict found for the plaintiff upon *all* the issues submitted.

QUESTIONS PRESENTED

The questions presented by this petition are:

First: Whether a judgment may be entered upon a general verdict when the jury has failed to answer an interrogatory submitted by the court, the answer to which interrogatory would establish a fact which is essential to a valid verdict.

Second: Where the jury disagrees as to a fact, the establishment of which is necessary before there can be a general verdict, does such disagreement of the jury have the legal effect of being a finding against the party upon whom the law places the burden of proof as to such fact.

Third: Has the petitioner been denied the right of trial by jury, as guaranteed by the seventh amendment to the Constitution.

REASONS RELIED UPON

The decision of the Circuit Court of Appeals, by affirming the judgment of the District Court, has sanctioned a procedure which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Also, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The question presented upon this petition is one of genuine, intrinsic public significance.

These reasons will be discussed fully in the accompanying brief.

WHEREFORE, your petitioner respectfully prays that this petition be granted and a writ of certiorari issued to the Circuit Court of Appeals of the Sixth Circuit.

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BRIEF

The solution of the problem presented in the petition for writ of certiorari turns upon the legal effect to be given to the failure of the jury to answer an interrogatory upon an issue of fact, the decision of which is necessary to a verdict.

If the jury fails to answer an interrogatory, does that mean that the jury has disagreed as to the fact embraced in the interrogatory? Or does it mean that it is equivalent to a finding as to such fact against the party upon whom the law places the burden of proof of establishing such fact? Since this problem pertains to a matter of procedure, it is governed by the rule or law of the federal courts and not by the rule or law of the state court,

Sibbach v. Wilson, 312 U.S. 1

What, then, is the federal rule as to the effect of the failure of a jury to answer an interrogatory? So far as we have been able to find, there is no adjudication in the federal courts upon this question.

There has been adjudication in the federal court, however, where the jury has failed in a special verdict to make a finding of fact, which fact was essential to a judgment, and the federal rule seems to be that where the jury fails in a special verdict to find an essential fact, it is equivalent to a finding on such fact against the party upon whom the law places the burden of proof.

Daube v. Philadelphia & R. Coal & Iron Co., 77 Fed. 713 (C.C.A. 7th).

By analogy there would seem to be no difference in principle between the failure of a jury to find an essential fact in a special verdict and the failure of the jury to find an essential fact by failing to answer an interrogatory which accompanies a general verdict.

In this case the law placed upon the plaintiff the burden of establishing by the preponderance of the evidence that he had suffered damage in either one or the other or both of the respects claimed in his cause of action before he would be entitled to a judgment, that is, the plaintiff had the burden of proving that he either suffered fumes damage or flood damage. If the plaintiff failed to sustain that burden, the defendant would be entitled to a judgment.

The inquiry as to whether or not the plaintiff has sustained that burden of proof can be determined specifically in one of two ways, either by having a jury to find a special verdict in which the jury would have to find specifically that the plaintiff had sustained such damage, or by a general verdict with an accompanying interrogatory which asked the jury directly and specifically if the plaintiff had sustained such damage.

If the inquiry took the form of a special verdict and the special verdict failed to contain a finding that the plaintiff had sustained any damage from either fumes or flood, that is, if the jury had not been able to agree in making up the

special verdict that the plaintiff had sustained any damage from either fumes or flood (caused, of course, by the defendant) then under the federal rule the effect of such failure of the jury to make a finding upon such essential fact would be equivalent to the jury's finding that the plaintiff had not sustained the burden of proof in this respect and would be equal to a finding for the defendant upon this issue of fact.

If such would be the legal effect of the failure of the jury to make a finding upon an essential fact in a special verdict, it would seem to logically follow that there would be the same legal effect by the jury's failure to find an essential fact in answer to a specific interrogatory.

Applying this rule to the situation in this case, when the jury failed to answer interrogatory K (Record, Volume 1, Page 36) it was equivalent to a finding that the plaintiff had not sustained the burden of proof to establish that he had suffered any fumes damage and if the plaintiff had not sustained that burden, he would not be entitled to recover a judgment for such claimed damages.

Likewise, applying the same rule, when the jury failed to answer interrogatory L it was equivalent to a finding that the plaintiff had not sustained the burden of proof that he had suffered any damage by any acts of the defendant on account of the loss of his cottages by the flood.

If the plaintiff had not been able to sustain the burden of proof which the law placed upon him of establishing either fumes damage or flood damage caused by the defendant, he was then not entitled to any judgment and there should have been a judgment for the defendant.

If, however, the proper rule to apply in the federal courts (although there has been no adjudication which we can find) is that the failure of the jury to answer an interrogatory is a disagreement of the jury upon the fact covered by the interrogatory, then the jury in this case was not able to agree either upon the issue of fumes damage or upon the

issue of flood damage, and that disagreement necessitated a new trial, notwithstanding the jury wanted to give the plaintiff \$7908.00, as juries frequently do when the defendant is a corporation, but the giving to the plaintiff some of the defendant's money ought to be the result of the jury's agreement, because it is the constitutional right of the defendant to have the jury pass upon all of the material facts in issue by unanimous verdict, and if the jury does not do so, the defendant has been deprived of a jury trial as guaranteed by the Seventh Amendment of the Constitution.

Hodges v. Easton, 106 U.S. 408.

As it stands now, Gulf Refining Company has a judgment against it based upon a verdict as to which the jury was unable to agree upon either one of the only two elements of damage that were involved in the action.

If a constitutional jury trial means unanimous agreement of the jury to a verdict, as it surely does, then we have been deprived of the right of trial by jury guaranteed by the Seventh Amendment to the federal Constitution.

RULE 49 b

FEDERAL RULES OF CIVIL PROCEDURE

The rules of civil procedure were promulgated by this Court under the authority of the Act of Congress of June 19, 1934. 48 Stat. 1064; 28 U.S.C. Section 723 b, c, and rule 49 b provides that the Court may submit to the jury, together with appropriate forms for a general verdict written interrogatories upon one or more issues of fact, the decision of which is necessary to a verdict.

This rule further provides what shall be done if the answer to the interrogatory is harmonious with the general verdict, and what shall be done if the answers are incon-

sistent with the general verdict, but the rule does not provide what the procedure shall be if the interrogatory is not answered at all. We cannot, therefore, find the answer to our problem in the rules. Further, since there has been no adjudication by this Court or any other federal court, so far as we can find, upon the precise question of procedure where there has been a disagreement of the jury in failing to answer an interrogatory upon an issue necessary to the verdict, it seems to us that the question is of sufficient importance to justify the issuance of the writ of certiorari.

THE CIRCUIT COURT OF APPEALS' OPINION

There is published as an appendix hereto for the convenience of the Court the opinion of the Circuit Court of Appeals, from which it will be seen that the question raised upon this petition for writ of certiorari was disposed of by the Circuit Court of Appeals upon an erroneous assumption of fact. The court assumed that the general verdict was for fumes damage alone and that the jury made no findings for the plaintiff for flood damage.

Upon this erroneous assumption the Circuit Court of Appeals found that the disagreement of the jury on the flood damage was immaterial.

The petitioner filed an application for rehearing, which is also printed as a part of the appendix hereto, in which it will be seen that it was demonstrated to the Court of Appeals that their assumption that the general verdict did not include any element of flood damage was entirely erroneous.

That demonstration will not be repeated here, but we respectfully request this Court to read the application for rehearing in the Circuit Court of Appeals, from which it will appear by reference to the charge of the trial court and the issues as presented to the jury and the general verdict itself, that there could be no doubt about the fact that the

general verdict of necessity included both the fumes damage and the flood damage.

The Circuit Court of Appeals' opinion upon the application for rehearing, also printed in the appendix, states that because the jury found in answer to interrogatory G, Record, Volume 1, Page 35, that the lease had been breached from January, 1934, to August, 1938, and that the only damage which had been claimed for this entire period was the damage from the fumes, that necessarily the general verdict covered only the fumes damage.

The incorrectness of this view is perfectly apparent when the plaintiff's claim is examined as it is alleged in the second amended petition upon which the case was tried, in which the plaintiff is claiming all damages both for fumes and for flood which occurred during the period from January, 1934 to August, 1938. The record shows that for the period prior to 1934 there had been a former action for fumes by the plaintiff covering the period from the installation of the refinery to January, 1934 and the plaintiff had recovered a verdict which the defendant had paid. Then the plaintiff waited until August, 1938 and began this, his second suit, and two other suits have subsequently been filed covering subsequent periods of years, so that the period from January, 1934 to August, 1938 is only one of the periods covered by the plaintiff's claims for damage, but it is the period covered by this particular suit, and within that period the flood occurred, in January, 1937, so that in this suit, which covered the period from January, 1934 to August, 1938 there was added, to the claim for fumes damages, the additional claim for the flood damage.

So that for the Circuit Court of Appeals to say in its opinion overruling our application for rehearing that the general verdict in this case reflected only fumes damage but no flood damage because the fumes damage was the only damage claimed for the period from January, 1934 to August,

1938 is simply a misstatement of a fact that is not in dispute in the record, because within that period, that is, in January, 1937 the claimed flood damage occurred.

The original opinion of the Circuit Court of Appeals on the point involved in this petition is founded upon an erroneous assumption of fact, and its opinion overruling the application for rehearing is based upon an equally erroneous assumption of fact, because the fumes damage was not the only damage which the plaintiff claimed occurred in the period covered by this action, that is, from January, 1934 to August, 1938.

Let us assume, however, that the Circuit Court of Appeals was right in saying that the failure of the jury to answer interrogatory L as to flood damage did not affect the general verdict because the general verdict did not contain any element of flood damage. What, then, can be said about the failure of the jury to answer interrogatory K (Record, Volume 1, Page 36), which interrogatory asked the jury to determine the amount, if any, of damages for the fumes?

The jury could not agree upon the amount of fumes damage and, therefore, failed to answer interrogatory K.

If, as the Circuit Court of Appeals held, the general verdict represents only the fumes damage, how can there be a valid general verdict if the jury was not able to agree upon the amount of the fumes damage, as it was not by its failure to answer interrogatory K.

The fumes damage was to be measured by the loss of the rentals of the cottages, and let us suppose, for illustration, that the jury had found that the plaintiff had only lost about \$500.00 in rentals on account of the fumes and had, therefore, answered interrogatory K by writing in the amount of \$500.00, but in the general verdict had put in the amount of \$7908.00, certainly there would have been an inconsistency between the answer to the interrogatory and the general verdict which would have caused the general verdict to fail

and judgment would have been entered upon the answer to the interrogatory under the provisions of Rule 49 b.

This means that the defendant was entitled to test the correctness of the general verdict by having interrogatory K answered, even if the general verdict did not contain any element of flood damage under the theory of the Circuit Court of Appeals, and where Rule 49 b gave to the defendant the right to have an interrogatory submitted to test the correctness of the general verdict, the trial court should have compelled the answer to that interrogatory or declared a disagreement of the jury and should have ordered a new trial. Under the theory of the Circuit Court of Appeals the trial court had a right to disregard the provisions of Rule 49 b and take the general verdict as if it were the answer to the interrogatory, and if this procedure may be followed by the trial court, then any disagreement of the jury upon any interrogatory may be disregarded even though the answer to that interrogatory may be the acid test for determining the validity of the general verdict. If the jury in this case could not agree upon the amount of fumes damage by its failure to answer interrogatory K, then that disagreement is not cured by taking the general verdict as if it were an answer to the interrogatory, even upon the erroneous theory adopted by the Circuit Court of Appeals that the general verdict reflected only the fumes damage.

Let us test the problem in another manner. Suppose the Circuit Court of Appeals was right in assuming that the general verdict included only the fumes damage. When the jury failed to answer interrogatory K it was equivalent either to a finding that the plaintiff had not sustained the burden of proof of establishing that there was fumes damage, or that the jury disagreed upon this issue, whichever is the proper rule of interpretation to be given to the failure to answer the interrogatory. If the former is the correct rule, then the failure to answer the interrogatory is equiva-

lent to a finding that the plaintiff has not proven that he had suffered any loss of rentals by reason of the fumes caused by the defendant. The general verdict, on the other hand, found that the plaintiff had proven such loss.

There would then exist an inconsistency between the interrogatory and the general verdict and Rule 49 b would require the trial court to enter judgment according to the interrogatory, or at least to grant a new trial because of the inconsistency. If the other interpretation of the effect of the failure to answer the interrogatory is the correct one, namely, that it amounts only to a disagreement of the jury, then the failure of the jury to answer the interrogatory is equivalent to an answer, "We cannot agree," but the general verdict says, in effect, "We can agree." That situation then creates an inconsistency between the interrogatory and the general verdict which, under Rule 49 b, at least requires the trial court to grant a new trial.

It does not seem to us that the proper interpretation of Rule 49 b leaves any discretion in the trial court to disregard the provisions of the rule and to grant a judgment upon the general verdict when that is manifestly inconsistent with the meaning of the failure to answer an interrogatory, because these rules of civil procedure adopted by this Court under the authority granted by Congress have a mandatory effect upon the trial courts, otherwise the whole system of rules will break down if the federal trial courts may follow them or not, depending upon the will of the particular trial judge. This case should afford this Court an early opportunity to announce to the federal trial courts that the rules of civil procedure adopted by this Court are to be followed in the trial of cases as they are written.

We respectfully contend, therefore, that the petitioner has not had a jury trial by unanimous agreement of the jury as the Constitution requires, and that the matter of procedure where there is a disagreement of the jury upon a fact

necessary for a verdict is of sufficient importance as bearing upon jury trials in the federal court to justify the granting of this petition.

Respectfully submitted,

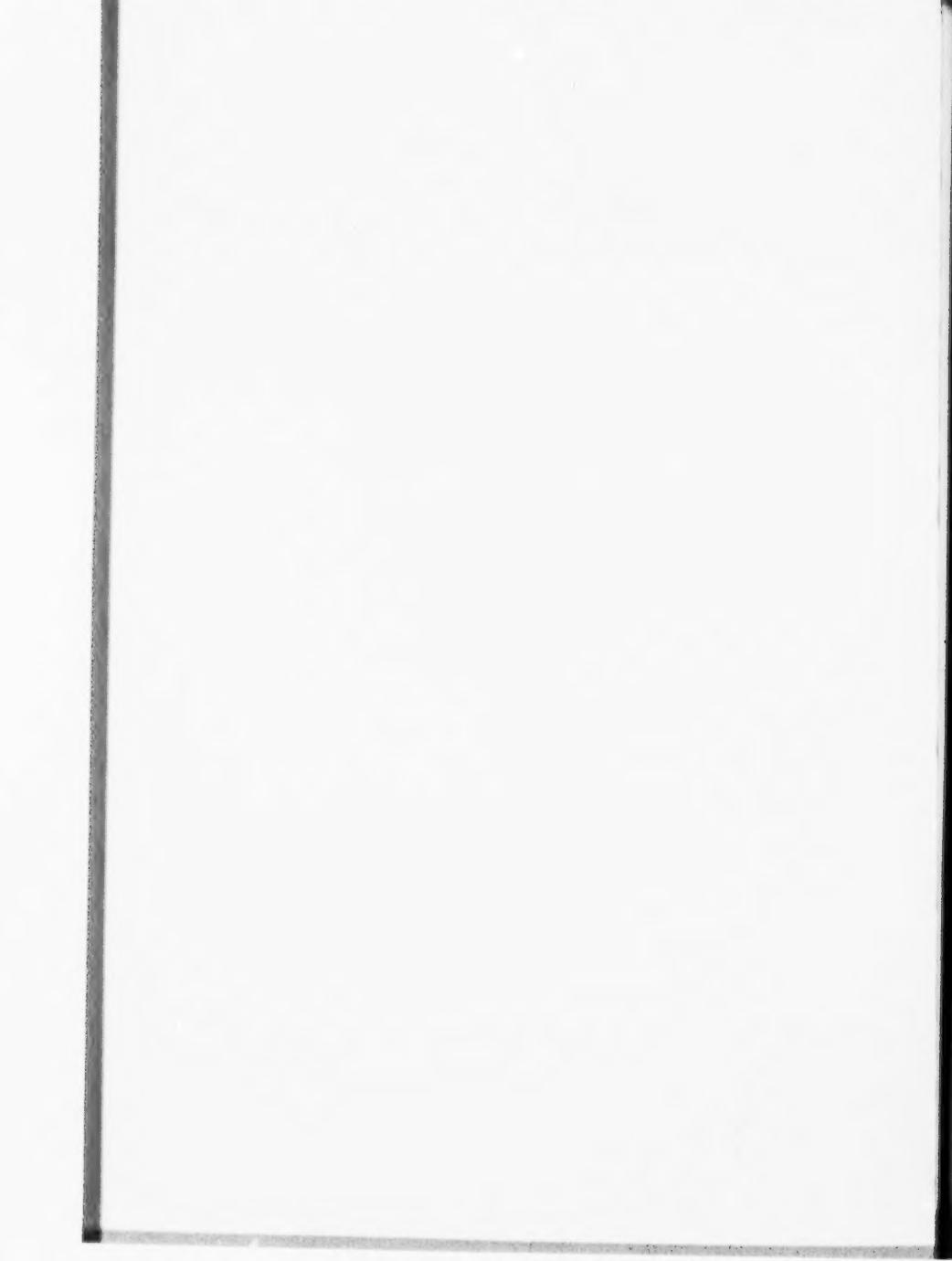
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APPENDIX

RULE 49 b

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

**OPINION OF UNITED STATES CIRCUIT COURT
OF APPEALS**

(Filed June 2, 1942.)

Before ALLEN, HAMILTON and McALLISTER, Circuit Judges.
McALLISTER, Circuit Judge. This is a suit brought by Louis Fetschan, herein referred to as appellee against The Gulf Refining Company for damages. The Cross Park Realty Company was joined as a nominal party defendant. Appellee had verdict, in the amount of \$7,908.00, upon which judgment was entered, and The Gulf Refining Company appeals. The action grows out of the erection and operation, by appellant, of a refinery upon land adjoining that leased by appellee. The damages claimed are alleged to have been suffered as a result of the noxious fumes emitted by the refinery, the discharge of waste, and the erection of levees around the lands upon which the refinery was situated, resulting in flood waters inundating the property leased by appellee.

Approximately nine miles north of its junction with the Ohio River, the Great Miami River makes a horseshoe bend. In the toe of this horseshoe, is a tract of land leased by appellee in 1925 from Mr. and Mrs. Roessler, for a 20-year period, with a renewal privilege for a further term of 10 years. The lease contains the usual covenant of quiet enjoyment, as well as against molestation, specifying that the leased premises are to be used for camp purposes.

In 1930, The Gulf Refining Company purchased from the Roesslers, all of the property within the horseshoe, including the part theretofore leased to appellee, the purchase being made subject to this lease. Thereafter, appellant constructed a refinery across the heel of the horseshoe. There was a roadway, which approximately bisected the refinery, over which appellee had means of ingress and egress. Appellant built levees around each half of the refinery area

(except where the natural terrain was higher than 496' above sea level). In January, 1937, there occurred a great flood of the Ohio and Miami Rivers. Appellee alleged that by reason of the levees erected by appellant, the flood waters of the great Miami River were deflected over his leasehold estate with greater force and violence than would have been the case had the water naturally flooded the property; and that as a result, 15 cottages owned by appellee were washed from their foundations and destroyed. Appellee further claimed damages on the ground that The Gulf Refining Company had permitted obnoxious, foul and nauseating odors and fumes to escape from the refinery; and that loud and nerve-wracking noises had emanated therefrom—all of which resulted in the refusal of tenants to rent, and caused appellee and his family to leave the premises. The trial court submitted eight special questions to the jury, which answered only one of them, and returned a verdict in the amount of \$7,908.00 in favor of appellee.

On appeal, The Gulf Refining Company claims that the proofs show that the appellee was not the real party in interest in bringing the suit; that the trial court erred in accepting the general verdict in spite of the jury's inability to answer the interrogatories; that there was no breach of covenant inasmuch as appellee was not actually or constructively evicted; that there was no evidence that the loss of appellee's cottages was caused by the erection of the levees; that appellee's recovery of damages in a prior suit was a bar to the present action; and that, because of the foregoing, the trial court should have directed a verdict on various issues of the case, and should have entered judgment on the rest of the issues in favor of appellant.

Three cases, brought by appellee, have been decided by the trial courts—the first, an action for damages alleged to have been suffered up to January, 1934, in which appellee

had judgment in the amount of \$1,000; the second, an injunction suit; and the third, the present controversy.

Appellant, in its contention that appellee was not the real party in interest, as required by Rule 17 (a) of the Federal Rules of Civil Procedure, offered in evidence two assignments of appellee's lease to The Cross Park Realty Company, and an agreement between the same parties, providing for payments to the company out of the proceeds of any sale of the leasehold. Appellant, by these exhibits, sought to show that appellee had parted with all of his interest in the premises. The trial court excluded this evidence on the ground that it had been previously determined, in another suit between the same parties, that the transactions in question had amounted to only a pledge of appellee's interest in the property, and that such determination was *res adjudicata*. Appellant, however, contends that appellee did not plead *res adjudicata* as an affirmative defense, as required by Rule 12 (h) of the Federal Rules of Civil Procedure. But it is not required that a plaintiff plead or reply to a defendant's answer, unless it contains a counterclaim, denominated as such. Rule 7 of the Federal Rules of Civil Procedure. See More's Federal Practice, Vol. 1, p. 421 et seq. It was unnecessary, therefore, for appellee to reply to appellant's answer by pleading *res adjudicata*. In passing, we have reviewed the determination of the Master Commissioner, to whom this question was referred upon the previous trial of the other case between the parties, and agree with his conclusion that appellee's transactions with The Cross Park Realty Company amounted to no more than a pledge of his interests in the premises. The District Court properly excluded the proffered evidence.

Appellant insists that under Ohio law there can be no breach of covenant for quiet enjoyment, unless the covenantee has been actually or constructively evicted; and that

there can be no such eviction unless possession has been lost or abandoned, as "the proposition that there can be retention of demised premises and an eviction, are logically and legally contradictory" (*Liberal Savings and Loan Co. v. Frankel Realty Co.*, 137 Ohio St., 489; *Wetzall v. Richcreek*, 53 Ohio St. 62); and that the evidence discloses that, while appellee moved away from the premises in January, 1932, he returned about a year and a half later, and remained there from that time until the present. Under these circumstances, it is contended that there was no loss or abandonment of possession, and, consequently, no eviction for which an action would lie for breach of covenant for quiet enjoyment. Without reviewing the authorities on this subject, or considering such questions as partial eviction, we are of the opinion that the judgment in this case should be sustained on the proof of breach of covenant, though not on the basis of breach of covenant for quiet enjoyment, in the strict sense in which that covenant is usually construed.

A covenant is nothing more than an agreement to do or not to do a particular act, and its language must be read in an ordinary or popular sense. *Elterich v. Leicht Real Estate Co.*, 130 Va. 224, 107 S. E. 735. It is to be construed, if possible, to effectuate the intent of the parties. A covenant for quiet enjoyment is an assurance against the effect of a defective title and of any resultant disturbance. It goes to the possession; *Cassada v. Stabel*, 90 N. Y. S. 533, 98 App. Div. 600; *Berger v. Weinstein*, 63 Pa. Super. 153; *Kane v. Mink*, 64 Iowa 84, 19 N. W. 852, 853; and is referred to as "a covenant for possession." *Price v. Deal*, 90 N. C. 290, 294. In *Wetzall v. Richcreek*, *supra*, it appears, according to the Ohio courts, that a covenant for quiet enjoyment is similar to a covenant of seisin, and that neither of such covenants is broken so as to give the covenantee a right of action, until there has been an eviction. In like manner, a covenant of

warranty and a covenant for quiet enjoyment are usually regarded as substantially equivalent. *Biwer v. Martin*, 294 Ill. 488, 128 N. E. 518. But such covenants, concerned with title and possession, are not generally construed as having to do with the manner in which premises are used, or disturbances other than those of possession. While there appears to be a conflict between courts of Ohio and those of various other states, on the proposition of whether an eviction is necessary to constitute a breach of covenant for quiet enjoyment—numerous jurisdictions holding that a disturbance of the covenantee's use of the property constitutes such a breach—nevertheless, it can be said that whether or not disturbance in the use of the property is included within a covenant for quiet enjoyment, parties may covenant as to the use of the leased property. Thus, a party can covenant that he will not cause noxious gases and fumes to disturb and nauseate a tenant in some particular use of the property; and such a covenant would not be merely a covenant for quiet enjoyment.

In the case before us, the lease provided as follows:

"And said Lessors for themselves and for their heirs, executors, administrators and assigns, COVENANT AND AGREE with the said lessee, his executors and administrators, that said lessee paying the rents and observing and keeping the covenants of this lease, on his part to be kept, shall lawfully, peaceably and quietly hold, occupy and enjoy said premises, during said term, without any let, hindrance, ejection or molestation by said lessors, or their heirs, or any person or persons lawfully claiming under them.

Said lessée shall use said premises for a camp for himself, associates and guests and has the right to remove all buildings and other fixtures he may now or cause to be erected on said grounds, during said tenancy; also the right to rent or assign said Camp or any part thereof under the covenants of this lease, but said lessee

for himself, his executors or assigns agrees to place the ground back to its original condition after removal of his buildings."

Thus, the lessor covenanted that appellee should use the premises for a camp for himself, associates, and guests, with the right to rent any part of the camp to others, and that he should enjoy the premises without any molestation by the lessors or any person claiming under them. To molest means to interfere with, so as to injure or disturb; molestation is defined as a wilful injury inflicted upon one by interference with the user of rights as to person or property. *Webster's New International Dictionary, Second Edition.* There was substantial evidence of odors, fumes, and gases emitted from appellant's refinery, continuously and in volume, as well as evidence that losses to appellee thereby ensued, as a result of persons leaving the premises which he had rented to them for camp and recreational purposes, and refusing to rent thereafter. Assuredly, this was substantial evidence of molestation of appellee in his use of the premises as a camp. In view of the fact that appellee's lessors covenanted for quiet possession and against molestation of appellee in his enjoyment of the premises, at the same time limiting the use of them to recreational purposes, it is apparent that the parties intended that the lessor would so use his property as not to destroy the use of the premises by the appellee for the only purposes for which they were permitted to be occupied; and, in order to effectuate such intention, we so construe the language of the covenant. Giving the language, above referred to, the ordinary, usual, and normal construction, it is clear that the jury had a right to conclude that the covenant was broken by appellant, causing the resultant damages. While, in the strict sense of the term, the operation of the refinery might not have resulted in a breach of covenant for quiet enjoyment, it could well have

been a breach of covenant that appellant would not molest appellee by interfering with his use of the property for recreational purposes; and, on this ground, the verdict of the jury and the judgment entered thereon, should be sustained.

Appellant contends that the trial court erred in entering judgment in favor of appellee, in spite of the failure of the jury to answer certain interrogatories, which were submitted. In his petition, appellee claimed damages of \$8,000 for loss of rentals from January, 1934, to August, 1938, because of appellant's operation of its refinery, resulting in the escape of obnoxious, foul and nauseating odors and fumes upon the leased premises, and the continuous noises, which destroyed the use of the premises as a camp. He also claimed as damages the sum of \$12,400 for loss and destruction of his cottages and other property, resulting from the flood waters, which he claimed were diverted against his buildings by the levees constructed by appellant.

The jury answered the following interrogatory in the negative, as indicated:

"Did the defendant, The Gulf Refining Company, as landlord, give to the plaintiff, quiet and peaceful enjoyment of his premises from January, 1934, to August, 1938, without hindrance or molestation as those terms have been defined to you?"

Answer: No."

The following interrogatories were submitted by the court, which the jury, after due deliberation, was unable to answer with unanimity:

"In the event that you find that plaintiff has been damaged by the emission of smoke, or odors, or gases, or smudge, or noises from the refinery of defendant, The Gulf Refining Company, and that The Gulf Refining Company is liable in damages to plaintiff therefor, state the amount of such damage."

Did the defendant, The Gulf Refining Company, erect the levees with knowledge that flood waters would be likely diverted from the area occupied by its plant and caused to go between the said plant and the River?

Could a man of ordinary skill and knowledge have reasonably foreseen that the construction of the levees in question in this case would cause damage to the property of the plaintiff?

Would plaintiff's cottages have been destroyed by the flood of 1937 even if the levees in question had not been there at that time?

Were plaintiff's cottages destroyed by an 'act of God' as that term has been defined to you?

In the event you find that defendant, The Gulf Refining Company, is liable to plaintiff for the value of those of his cottages which were destroyed by the 1937 flood, state the reasonable value of those cottages immediately prior to that flood."

The trial court received the general verdict and entered judgment thereon. It is obvious that the jury based its verdict on loss of rentals resulting from the fumes, odors, and noises attendant upon the operation of appellant's refinery for the period between January, 1934, and August, 1938. It expressly found that the covenant against molesting appellee in the use of the premises had been broken. Appellee's claim for rentals was \$8,000. The jury allowed \$7,908. The jury's answer to the special interrogatory was consistent with its general verdict. It was therefore unnecessary to answer the special interrogatory asking what damages were allowed on the issue of the smoke, fumes, odors, and noise. The only breach of covenant claimed between 1934 and 1938 was that appellant would not molest appellee in his use of the premises. The only way in which this covenant was claimed to have been broken during that period, was by appellant's conduct with reference to the fumes, odors, and noise. The only damages claimed for such breach were for

losses of rentals during that period. The damages found in the general verdict, based on the answer to the special interrogatory, were for loss of rentals resulting from the smoke, fumes, odor, and noise. These conclusions are inescapable. All of the other interrogatories, which were not answered by the jury, were concerned with damage resulting from the diversion of flood waters. It is clear that, while the jury agreed on the damages caused by the fumes, smoke, and noise, it could not agree on the question of whether appellee was further damaged by appellant's conduct with reference to the flood waters. Obviously, appellee recovered nothing on that issue; but he makes no complaint because of the unanswered interrogatories. His counsel moved for a judgment on the verdict, and submits that this action amounted to a waiver of any right on the part of appellee to recover for the destruction of property resulting from diversion of flood waters. We are unable to see how appellant is injured by failure of the jury to find on this issue. If the jury had answered all of the other interrogatories adversely to appellee, he would still be entitled to a verdict for loss of rentals, in view of the one interrogatory which the jury did answer; and the general verdict was consistent with such answer.

Special verdicts and interrogatories are authorized by Rule 49 (a), (b), of the Federal Rules of Civil Procedure, and federal courts are governed by such rules of practice and procedure, rather than those of the State court. *Mayer v. Aetna Life Insurance Co.*, 126 Fed. (2d) 141 (C. C. A. 3); *Dallas Ry. & Terminal Co. v. Sullivan*, 108 Fed. (2d) 581 (C. C. A. 5). Rule 49 (b) of the Rules of Civil Procedure, provides that when the general verdict and answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. The failure to answer interrogatories is not fatal where the general

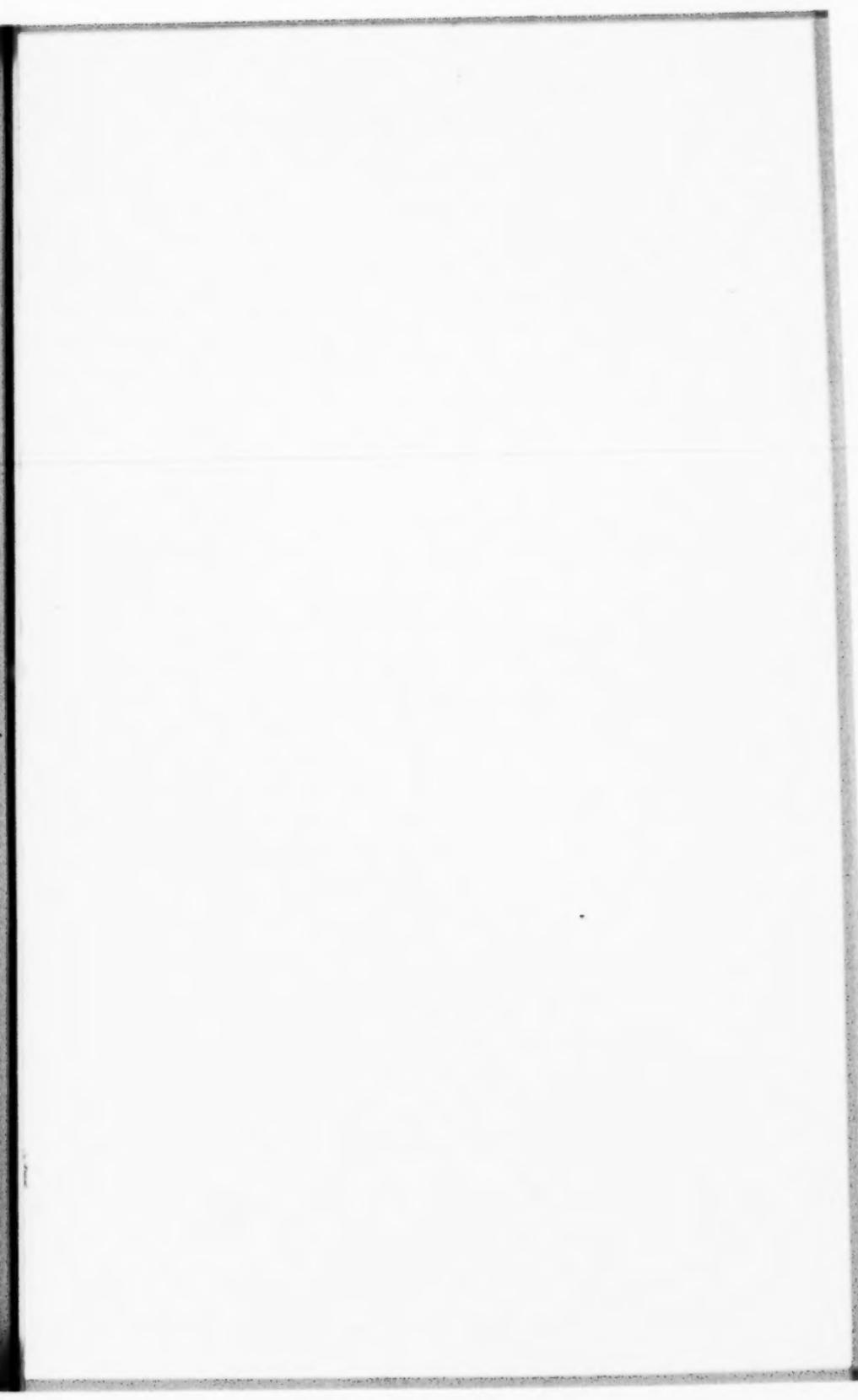
verdict can be supported on other facts, or where answers to such questions, favorable to the party against whom judgment is rendered, would not necessarily render the judgment erroneous. *O'Connell v. United Rys. of San Francisco*, 19 Cal. App. 36, 124 P. 1022. Under a statute, providing that where a special finding of fact is inconsistent with the general verdict, the former controls, and the court must give judgment accordingly, if a finding in a defendant's favor on special interrogatories would not be inconsistent with a general verdict for a plaintiff, a failure to find *at all* on such interrogatories, can not control such general verdict; *Weck v. Reno Traction Co.*, 38 Nev. 285, 149 P. 65; and where several grounds of recovery are alleged, and an interrogatory goes only to one, the general verdict will stand, notwithstanding a failure to agree on an answer to the interrogatory. *Russell v. Oregon R. & Nav. Co.*, 54 Oregon 128, 102 P. 619. The jury in the instant case, having found in appellee's favor on the question of loss of rentals, as evidenced by its answer to the interrogatory, relating to breach of covenant, its verdict must be sustained. There is no claim made that the damages awarded were excessive, on the issue of smoke and fumes. Its failure to answer the interrogatories relating to the loss and destruction of property from flood waters, is not ground for setting aside the verdict, in view of appellee's motion for judgment thereon. By such action, appellee waived his right to recover such additional damages, and accepted the judgment as an adjudication of all of the claims included in his petition. No disadvantage or prejudice to appellant resulted therefrom. There was no error in entering judgment on the verdict.

Appellant claims that the trial court erred in excluding certain pleadings and proof of judgment in another case between the same parties, contending that such evidence was complete proof of a bar to the present action. The prior suit brought by appellee against appellant herein, was based upon a claim for damages up to January, 1934, resulting from

appellant's operation of its refinery, whereby fumes, smoke, and stench were alleged to have been emitted onto the premises leased by appellee. The theory on which that case was tried by the court and both parties, was that it was an action in tort for damages resulting from a nuisance. Appellee had judgment from which an appeal was taken by The Gulf Refining Company and, thereafter, dismissed on motion of its counsel *Gulf Refining Co. v. Fetschan*, 92 Fed. (2d) 1004 (C. C. A. 6). On trial of the present case, appellant sought to introduce the pleadings and judgment in the so-called nuisance case, in proof of the claim that such pleadings and judgment were a bar to an action for damages in the present controversy. The basis of this contention is that one who is damaged by a permanent nuisance, can not split his actions for damages, but must recover all, past and future, in one action. To this, the answer of appellee was that the prior action was in tort and the present one, on contract; that the nuisance was not one which must be considered permanent, as it might be abated by appellant or by the court, and that, therefore, appellee has the right to treat it as a temporary wrong, to be compensated for while it continues. Appellee's petition in the prior suit was limited in its claim for damages up to the date of the filing of the petition; and, in that case, the trial court, in instructing the jury, expressly limited plaintiff's right to recover to the same extent. We find no error in the court's exclusion, in the trial of the instant case, of the judgment and pleadings in the "nuisance case."

Other questions raised on appeal are concerned with claimed errors of the trial court in submitting to the jury matters relating to the flood issue. Inasmuch as the jury found no damages on such issue, there was no prejudice resulting to appellant from any instructions in this regard; and discussion of these propositions is unnecessary to a determination of the case.

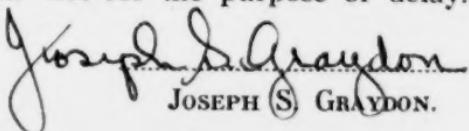
The judgment of the District Court is affirmed.





CERTIFICATE OF COUNSEL

Joseph S. Graydon, one of counsel for the appellant, Gulf Refining Company, certifies that this Petition for Rehearing is made in good faith and not for the purpose of delay.



JOSEPH S. GRAYDON.

PETITION FOR REHEARING

The appellant, Gulf Refining Company, petitions this Court for a rehearing for the reason that the decision of this Court as shown by the opinion is founded upon an erroneous assumption of fact, which is not supported or justified by the record.

As will be shown presently by reference to this Court's Opinion, this Court assumed that the general verdict was for damages because of and solely because of the fumes and odors that were emitted from the defendant's refinery, and did not include any damages because of the flood waters which washed away the plaintiff's cottages. If this assumption were justified by the Record, then all else that is said in the Opinion might logically follow, but where the false assumption is concerning a definite fact that can be demonstrated from the Record, then we feel justified in making this positive assertion, and respectfully request the Court to re-examine this question of fact, as it is shown without doubt or uncertainty by the Record, to which we shall presently refer.

To show that this Court's decision is based upon the incorrect assumption that the general verdict was for the "fumes damage" alone, we quote from the printed opinion on page 7 as follows:

"It is obvious that the jury based its verdict on loss of rentals resulting from the fumes, odors, and

noises attendant upon the operation of appellant's refinery for the period between January, 1934, and August, 1938."

Further down on the same page the Opinion states as follows:

"The only way in which this covenant was claimed to have been broken during that period, was by appellant's conduct with reference to the fumes, odors and noise. The only damages claimed for such breach were for losses of rentals during that period. The damages found in the general verdict, based on the answer to the special interrogatory, were for loss of rentals resulting from the smoke, fumes, odor, and noise."

Thus this Court decided that the general verdict was based solely upon the fumes damage apparently because the Court was under the impression, wrong as it was, that the answer to the only one interrogatory, which the jury was able to answer, pertained solely to the fumes damage, and did not include any flood water damage. That interrogatory and the jury's answer was as follows:

"Did the defendant, The Gulf Refining Company, as landlord, give to the plaintiff, quiet and peaceful enjoyment of his premises from January, 1934, to August, 1938, without hindrance or molestation as those terms have been defined to you?

Answer: No."

This interrogatory was framed and submitted for the purpose of having the jury determine whether there had been any breach of the lease, either by reason of fumes damage or by flood damage, because both of these elements of damage had been asserted in the Second Amended Petition as arising because of the breach of the lease, and the right of action was founded entirely *ex contractu* and not *ex delicto*.

We surmise that this Court must have been under the misapprehension that the claim for damages on account of the flood waters was a claim arising *ex delicto*, and that the claim for the fumes damage was the only claim arising out of a breach of the lease. The fact is as shown by the Second Amended Petition, as well as the charge of the trial court, that there were not two separate causes of action but only one cause of action based upon the claim of a breach of the lease, and there were two elements of damages claimed by the plaintiff to have arisen because of the breach of the lease contract: First, the fumes damage causing loss of rentals; and second, the flood water damage causing loss of cottages. And the case was tried upon that theory.

If the case had been founded in the Second Amended Petition upon two separate causes of action, first a claim that the defendant had broken its lease by reason of the fumes which came from the refinery, and second that the defendant had erected levees (not in violation of the covenant of its lease against molestation, but in such a wrongful or negligent manner as to cause a common law tort) then this Court might have been justified in finding that the interrogatory referred only to the breach of the lease against molestation by fumes, and had no reference to the damages arising from the erection of the levees and the resulting flood water damage.

No two such separate and distinct causes of action are, however, joined in the Second Amended Petition, though they might have been under the Ohio Statute permitting the joinder of different causes of action, even though one may sound in contract and the other in tort.

This Court is compelled to take this cause of action as it was actually alleged in the Second Amended Petition and as it was actually submitted to the jury, and in both instances (that is, in the Second Amended Petition and in

the Court's charge) the right of action is founded solely and entirely upon the claim of breach of the lease contract. This distinction is of such vital importance and the determination of the question as to whether the answered interrogatory had reference solely to the fumes damage, as this Court assumed it did, (incorrectly as we think) requires reference to the Record, where it will be found on page 6 and 7, Volume I, that the Second Amended Petition alleges as to the flood water damage as follows:

"Whereas defendant, by the terms of the lease aforesaid, had agreed that the plaintiff would enjoy the premises described in the petition without any let, hindrance, or molestation on defendant's part."

In other words, the plaintiff's claim by the Second Amended Petition, with reference to the construction of levees and the flood water damage, is a claim that the defendant's liability in this respect, arose not because of any tortious breach of a common law duty, but because of the breach of the covenant of the lease providing against molestation.

The basis of flood water liability, as alleged in the Second Amended Petition, arising solely from the breach of the lease, is the theory adopted by the trial court in submitting the case to the jury, and reference to the Court's charge on this point is as follows:

First it appears in the Court's charge on page 1084, Volume II of the Record, in the last part of the first paragraph on that page, where the trial court repeats the wording of the Second Amended Petition just above quoted, to the effect that the flood water damage claim was because the plaintiff claimed that the defendant's conduct in the building of the levee resulted in a molestation of the plaintiff's premises in violation of the terms of the lease. And on page 1089, Vol-

ume II of the Record the trial court charged in the second paragraph: "Plaintiff premises his action upon a certain contract or lease, which has been marked in this case as Exhibit Number 1." * * * "It is this provision of the lease just quoted that plaintiff claims defendant Gulf Refining Company has breached and on account of which breach he claims to have been damaged in the manner and in the amount as set forth in his second amended complaint."

Then on page 1090, Volume II, the Court charged definitely that both claims of damage, that is, for fumes and for flood water, are asserted by the plaintiff as arising because of the breach of the lease, and the jury is so specifically and definitely charged in this respect that we quote the Court's charge on page 1090 as follows:

"Plaintiff charges and claims that his contract of lease has been breached by the defendant Refining Company in two ways: (1) because of odors and noises and fumes given off from and through the operation of its plant at or near Hooven and west of the property on which plaintiff has his lease, and (2) because of the erection of certain levees upon parts of its property and around its tanks which plaintiff claims resulting in throwing and diverting the water upon the property which is covered by his lease, resulting in the washing away of some of his cottages at the time of the flood that occurred in that vicinity and elsewhere in the year 1937."

It will be seen, therefore, that both from the pleadings and the Court's charge, the fumes damage and the water damage was submitted to the jury as arising solely from the breach of the lease.

Consequently, when the jury answered the interrogatory by saying that the Gulf Refining Company had not given

the plaintiff the enjoyment of his premises without hindrance or molestation "*as those terms have been defined to you*," the jury's answer had no more reference to one source of damage than the other, and nothing whatever justifies this Court in assuming that the jury's answer had reference solely to the fumes damage, because the trial court told the jury that it meant both the fumes damage and the flood damage, and as there was nothing in the interrogatory to separate the two sources of damage there is no more justification for inferring that the interrogatory referred to fumes damage alone than it is to infer that it referred to water damage alone.

The only justified meaning therefore, is that the interrogatory referred to both damages; and if that is so, then the Court's decision is based upon an entirely false assumption of fact.

That the Court did in fact proceed upon this false assumption is found in this Court's Opinion, where, on page 7, the following statement is made:

→ "The only way in which this covenant was claimed to have been broken during that period, was by appellant's conduct with reference to the fumes, odors and noise. The only damages claimed for such breach were for losses of rentals during that period. The damages found in the general verdict, based on the answer to the special interrogatory, were for loss of rentals resulting from the smoke, fumes, odor, and noise."

That statement shows clearly that this Court did not realize that the flood water damage was also claimed to have arisen by reason of the breach of the covenant of the lease, and without any question the case was submitted to the jury upon the claim that the flood water damage as well

as the fumes damage arose *solely* from a claimed violation of the covenant of the lease providing against molestation. Therefore, when the jury answered the interrogatory, the answer meant both the fumes damage and the flood damage, and the general verdict fixing the amount of damage, of necessity, included both elements of damage, as the general verdict was based upon the answer to this interrogatory, as this Court has said.

The mere fact that the jury's verdict of \$7908.00 was closer to the amount demanded by the plaintiff in his Second Amended Petition, for the loss of rentals because of the fume damage, than it was to the amount of \$12,400 which the plaintiff was demanding for the loss of his cottages from flood water damage, of course, means nothing whatever. So far as the record shows, the amount of the general verdict must have included both damages.

As the general verdict must have contained the amount of damages for both fumes and water as the record stands, we then have a situation where there was a disagreement of the jury, by failing to answer Interrogatories K and L, the former requiring the jury to state the amount of damages by reason of fumes, and the latter by reason of flood.

If the general verdict was for the fumes damage alone (as this Court erroneously assumed) then there could have been no disagreement of the jury in answering interrogatory K, which asked for the fixing of the amount of the fumes damage, because then the answer to interrogatory K would have been the same as the amount of the general verdict.

The failure to answer interrogatory K can mean only one thing: that the jury could not agree upon the amount of the fumes damage. Likewise, the failure to answer interrogatory L meant there was a disagreement of the jury on the amount of the flood water damage.

As the jury has not been able to agree upon the amount of fumes damage or upon the amount of the flood water damage, and since the general verdict contains both elements of damages as the record stands, then the general verdict does not represent an agreement of the jury.

This means that the Gulf Refining Company has a judgment against it when the jury was not able to agree, and it is equivalent to denying to this defendant the right of trial by jury which is guaranteed by the Seventh Amendment of the Constitution of the United States.

And further, we have a disagreement of the jury in failing to answer the other interrogatories, C. H. I and J, which dealt with the fundamental basis for liability of the defendant with reference to the flood water; and without the determination of the facts called for in such interrogatories, the jury could not have fixed any liability for flood water.

There are a number of other pertinent and decisive problems that were presented to this Court in the brief, but which this Court has not attempted to decide, because those questions pertained to the flood water damage, which this Court erroneously considered was out of the case because the answer to Interrogatory G eliminated the flood water damage; and we respectfully urge that a rehearing should be granted to us so that we may demonstrate to the Court that the answer to Interrogatory G did not eliminate the flood water damage, but on the contrary, included that element of damage.

Certainly if this Court can be shown that it proceeded entirely upon a false assumption of fact, the Court would not only be willing to re-examine its decision, but quite anxious to do so. The fact that this Court has announced its decision will surely not create any pride of opinion which would prevent a re-examination of this appeal, especially if

the Court's decision is wrong, and we believe that a rehearing will convince this Court that its decision is wrong.

Respectfully submitted,

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OPINION OF UNITED STATES CIRCUIT COURT
OF APPEALS

(Filed August 28, 1942.)

Before ALLEN, HAMILTON and McALLISTER, Circuit Judges.

PER CURIAM. We cannot agree with the contention of appellant, in its petition for rehearing, that there was an inconsistency in the verdict of the jury in its failure to answer certain interrogatories.

Appellee Louis Fetschan can be fairly said to have claimed that the appellant had breached the lease in question in two ways: first, that it caused noxious fumes to be emitted onto appellee's premises; second, that it caused flood waters to be diverted onto such premises. For the damages caused by the fumes, appellee claimed \$8,000.00; for the damages caused by the flood waters, he claimed \$12,400.00. The jury awarded damages of \$7,908.00. It was unable to answer the interrogatories with regard to damages caused by the flood waters.

The fumes damage was claimed as covering the period from January 1934 to August 1938. The jury, in its answer to an interrogatory, found that the lease had been breached "from January 1934 to August 1938." The only damage claimed *for this period* was damage from fumes. The flood damage did not occur until January 1937. In support of the verdict, we are of the opinion that the jury's answer to the interrogatory should be interpreted as a finding that the lease had been breached because of the emission of fumes, during the period commencing January 1934 and continuing until August 1938.

But in order to affirm the judgment, it is not required that even such reasonable inferences be drawn from the jury's finding. If it had found in favor of the appellant on all of the unanswered interrogatories, relating to the flood

damage, its verdict would still be supported by its answer that the lease had been breached during the above-mentioned four-year period. We do not consider other questions raised to be meritorious, and the petition for rehearing is denied.



Supreme Court of the United States

October Term, 1942.

GULF REFINING COMPANY,

Appellant Below

Petitioner,

vs.

LOUIS FETSCHAN and CROSS PARK REALTY COMPANY,

Appellees Below

Respondents.

BRIEF

The petitioner states at page 1 of its brief that "the failure of the jury to answer an interrogatory upon the issue of fact, the decision of which is *necessary* to a verdict" is the question presented by its petition. The District Court and the Court of Appeals agreed with us that an answer to the interrogatory was not necessary since the failure to answer it was not inconsistent with or irreconcilable with the general verdict. Rule 49b of Civil Procedure of this Court, makes it clear that the answer of the jury to the interrogatory or its failure to answer, must be *inconsistent* with the general verdict to control it.

There were two issues in the case, namely, damages resulting to the lessee, Fetschan, from the breach of its lease by petitioner herein from January 1934 to August 1938 and the question as to whether said lessee was damaged by levees around petitioner's plant causing the wash-

ing out of fifteen of his cottages during the great flood of January 1937. Counsel for the petitioner have overlooked

McCrate v. Morgan Packing Co., 117 Fed. (2d) 702
Cranston v. Baltimore & Ohio Ry. Co. 109 Fed. (2d) 630

wherein the United States Circuit Court of Appeals point out the effect of "the two issue rule", in stating there is no adjudication in the federal courts on the question as to the effect of failure to answer an interrogatory. Rule 49b is clear. It requires an inconsistency between a general verdict and an interrogatory for the latter to control the former. In the case at bar the jury answered an interrogatory finding petitioner had breached its lease from January 1934 to August 1938 (petition herein page 4.) This was consistent with the general verdict and labeled the issue on which the jury found. By failing to answer various interrogatories as to flood damage the jury made it clear they could not agree and find on this issue. The respondent, Louis Fetschan, by moving for judgment waived his right to a finding on this issue. The jury voted 11 "yes" to 1 "no", as to one interrogatory wherein they were asked if petitioner's levees caused flood waters to be diverted onto respondent's property during the flood mentioned.

Counsel for petitioner have the burden of showing wherein the failure of the jury to answer the one interrogatory (K) was inconsistent with the general verdict. This they have avoided and begged the question.

If it be considered that the question is one of substantive law and not of procedure and that the law of Ohio and not Rule 49b governs, then we say the law of Ohio is not different.

Pendergast v. Ginsberg, 119 Ohio St. 360, wherein the Supreme Court of Ohio stated that unless special findings, when considered together, are inconsistent and irreconcilable with the general verdict they do not control it.

THE CIRCUIT COURT OF APPEALS OPINION

At once counsel for the petitioner forgot that it is their task to show that the jury found there was flood damage and not damage for breach of the lease in respect to odors, noises, dirty air and the like, in order to talk about the jury's failure to answer the interrogatory being inconsistent with the general verdict. The Circuit Court of Appeals found (Appendix Petitioner's Brief, pages 18 to 21) that it was "obvious that the jury based its verdict on loss of rentals resulting from fumes, odors, and noises attendant upon the operation of the Appellant's refinery for the period between January 1934 and August 1938". All that the Court really needed to find was that the jury *could consistently* so find. We agree that it is obvious that the jury did so find. The Court then points out that the jury have found the covenants of the lease had been broken for the period last mentioned and respondent, Fetschan, had been damaged thereby \$7,908.00 and that it was "unnecessary to answer the special interrogatory asking what damages were allowed on the issue of the smoke, fumes, odors and noise."

Not only was this interrogatory answered by the general verdict, as was stated by the Court of Appeals above, but if it had not been so answered it would not be inconsistent with the general verdict for several reasons. One of these reasons was that the interrogatory did not contain all elements of damage involved in the breach of the lease, as found by the jury, for years 1934 to 1938 such as to the

road, menace of the levees and the like which the jury might have been unable to separate and fix in amounts, as elements of damage, although agreeing on the sum total of loss of rentals and respondent's damage. The jury might well have disagreed as to what factor noises were in driving respondent's tenants from his property or what odors had to do with it, while having no difficulty in finding that the sum total of petitioner's acts caused respondent's loss and the amount thereof.

Under the Rule 49b the failure to answer the interrogatory must be shown to be inconsistent with the general verdict, the same as an answer thereto (if made) to be inconsistent. Lack of an answer cannot be more of a factor than an answer. As long as the interrogatory has been answered by the general verdict or it appears consistent for a jury to fail to answer it and to render a general verdict it does not control the general verdict. The petitioner has the task of showing that the general verdict could not be properly arrived at until after this interrogatory was answered. The interrogatory contained several elements of damage, and left out others, hence the jury (if they considered it as not answered by the general verdict) might have been unable to answer it for that reason. Really the interrogatory should not have been submitted to the jury at all for that reason. The petitioner might just as well have asked the jury what was the sum Fettschan was damaged from odors alone, and in another interrogatory what was his damage from noise and in still a third interrogatory, what was his damage from dirt. The jury might very consistently have found it impossible to separate these three elements of damage while having no trouble in finding the three together produced a sum total of loss of rentals. The jury would have been compelled to guess in order to give a sum for only certain

factors of damage, when the evidence did not separate the damage caused by each element and others.

We submit there is nothing new or novel involved before the Court in this cause. This is an ordinary contract action in which damages are sought for the breach of the terms of a lease. The failure of a jury to answer an interrogatory, found not to control the general verdict by the District Court and the Court of Appeals, can hardly be stretched into a case involving the constitutional right to trial by jury in the Federal Courts. Certainly the court is not going to say that all interrogatories propounded to a jury must be answered whether they control the general verdict or not; that such interrogatories must be answered whether the failure to answer them is consistent with the general verdict or not; that they must be answered although answered by the general verdict.

Respectfully submitted,

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